

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Executive Director
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Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

Filed at: www.regulations.gov

**Re: Docket No. SSA-2008-0033 – Proposed Rule on Setting the Time and Place for a
Hearing before an Administrative Law Judge**

Dear Commissioner:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR) in response to the notice of proposed rulemaking (NPRM) regarding, Setting the Time and Place for a Hearing before an Administrative Law Judge, 73 Fed. Reg. 66564 (Nov. 10, 2008), Docket No. SSA-2008-0033.

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability or Supplemental Security Income (SSI) benefits. NOSSCR members represent these individuals with disabilities in legal proceedings before the Social Security Administration and in federal court. NOSSCR is a national organization with over 3,900 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

We strongly support changes to make the process more efficient so long as those changes do not affect the fairness of the procedures used to determine a claimant's entitlement to benefits. As described below, we have very serious concerns about the NPRM. We believe that the proposed change could be inconsistent with the protections afforded Administrative Law Judges (ALJs) under the Administrative Procedure Act (APA) and could have a negative impact on claimants in the hearing process.

We are encouraged that the Commissioner has made reducing the disability claims backlog one of his highest priorities. We also are strong proponents of the need to commit resources and personnel to reduce delays and make the process work better for the public. We believe that the primary reason for the continued and growing disability claims backlogs is that SSA has not received

adequate appropriations for its administrative budget for more than a decade. While the FY 2008 appropriation has allowed the agency to hire some new staff and work to reduce processing times, it is far from adequate to fully restore the agency's ability to carry out its mandated services. The dramatic increase in the disability claims backlog coincides with this period of under-funding the agency. Without adequate appropriations, it will deteriorate even more.

It is incumbent on everyone involved in the hearing process to work together to move cases as expeditiously as possible. Under the NPRM, control over the scheduling of hearings would be transferred from ALJs to SSA in "those situations where an ALJ is not scheduling the number of hearings that we consider sufficient." 73 Fed. Reg. 66565. Scheduling more hearings is not going to accomplish that goal. It could, under this proposed rule, interfere with ALJ protections under the Administrative Procedure Act (APA).

I. The Proposed Change Could Be Inconsistent with Protections Afforded ALJs Under the Administrative Procedure Act.

ALJs are appointed under the Administrative Procedure Act (APA), which guarantees their independence from undue agency influence. The critical role that ALJ decisional independence plays in protecting the rights of claimants cannot be underestimated.

A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from any agency coercion or influence. The most compelling example of the importance of the APA's protections occurred in the 1980s when, unlike today, SSA had a number of policies that were inconsistent with the Social Security Act. ALJs confronted these policies and reversed thousands of improper terminations and denials.

One of the protections provided by the APA is a limit on ALJ discipline by the agency. Under the APA, most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB). For most disciplinary actions, the agency must show "good cause." Whether low productivity by SSA ALJs constitutes "good cause" has been the subject of litigation over the last few decades. The MSPB and court decisions seem to rule out the imposition of productivity quotas, but do allow reasonable production goals.

In examining productivity of specific ALJs, the MSPB does not look at case dispositions in a vacuum. Rather, it has applied the concept of "comparative productivity," which is shown, not by case disposition numbers alone, but also by measuring, among other factors: (1) the types of appeals; (2) the different types of dispositions; and (3) the complexities of the cases. In addition, the MSPB notes that all SSA ALJs are not "fungible" and that it is possible, even with random assignment, that a single ALJ could be assigned a disproportionate share of difficult and time-consuming cases.

We are concerned that this NPRM is being used as an alternative disciplinary tool. The preface says that the proposed change "in no way interferes with the well-respected role of the ALJs to hear and decide cases." 73 Fed. Reg. 66564. However, the NPRM rationale seems impermissibly broad by giving the agency the authority to schedule hearings "where productivity is below what we need to

meet our goal to drive down the backlog,” *id.*, and in “only those situations where an ALJ is not scheduling the number of hearings that we consider sufficient.” 73 Fed. Reg. 66565.

There is no mention of the criteria required by the MSPB regarding “comparative productivity.” What is meant by productivity “below what we need” or by an ALJ not scheduling the number of hearings “that we consider sufficient”? We believe that these vague standards could lead to improper exercise of authority by the agency. For instance, could agency control over scheduling hearings be linked to the discredited Bellmon Review Program from the 1980s? The Bellmon Review Program allowed the agency to target specific ALJs with allowance rates that it considered as being too high. The Review Program was challenged in a number of lawsuits and it was discontinued before the courts ruled on this feature of the Program. Before it ended, the Program raised significant concerns by the public and Congress and did affect the public’s confidence in the fairness of the hearing process.

The MSPB and the courts have interpreted the APA to allow SSA to take certain actions to increase ALJ productivity, such as setting reasonable production goals (as opposed to quotas). We support such efforts, but not if they impermissibly interfere with ALJ independence and authority for the conduct of hearings. The proposed change presents potential conflicts with the APA and also could impact the public’s confidence in the process.

We support any agency initiatives that will decrease the backlog, so long as they do not affect a claimant’s right to an impartial hearing before an ALJ. This NPRM has possible negative consequences that could fundamentally impair this right, as discussed below in Section III. Given that only a “small number of ALJs” would be affected by the NPRM, 73 Fed. Reg. 66564, and the negative impact of this proposed change, we recommend that SSA find a narrower approach for dealing with this issue.

II. The NPRM Does Not Consider Factors That Affect Productivity Outside The ALJ’s Control.

Merely looking at numbers regarding productivity does not tell the entire story. We cannot condone low productivity that is completely within the control of an individual ALJ. Nevertheless, there are a number of factors outside their control that can significantly affect performance. As one reason for proposing this change and setting a goal of 500 dispositions per year for full-time ALJs, the NPRM preface cites a report by the SSA Office of Inspector General (OIG) from February 2008. However, the preface fails to mention a more recent OIG report that specifically addresses factors affecting hearing office productivity, *Congressional Response Report: Administrative Law Judge and Hearing Office Performance* (“OIG Report”).¹ The OIG Report findings are consistent with concerns reported to us by claimants’ representatives. It is troubling that the NPRM provides no consideration of these factors and would allow SSA to take over the scheduling of hearings for an ALJ who is facing productivity factors outside of his/her control.

A. Staffing Shortages Are the Most Critical Factor Affecting Hearing Office Performance

¹ No. A-07-08-28094 (Aug. 2008). The report is available at www.ssa.gov/oig/ADOBEPDF/A-07-08-28094.pdf.

Over the last decade, concurrent with the marked increase in the disability claims backlog, claimants' representatives have noted the loss of ALJs and support staff in hearing offices around the country. Whether there are enough ALJs may not even be the primary staffing issue in hearing offices. Productivity is not related solely to the number of ALJs, but also to the number of support staff. According to the August 2008 OIG Report: "[I]t appears that staff ratios may be one factor that impacts ALJ and hearing office productivity and processing times."² The OIG found that ALJs with higher disposition levels were more likely to be in hearing offices with staffing ratios above the FY 2007 national average. Further, hearing offices ranked in the top half for productivity were "much more likely to exceed the national average staff ratio than hearing offices ranked in the lower half for productivity."³

Testimony by the SSA Chief Administrative Law Judge at a September 2008 House Ways and Means Social Security Subcommittee hearing corroborates the OIG Report findings. The Chief Administrative Law Judge testified that to reach a goal of 500 annual dispositions per ALJ (as described in the NPRM introduction), the staffing ratio in hearing offices would need to be increased by at least 500 support staff.

An inadequate number of support staff is not the only issue to consider. In addition to having enough staff, the quality and composition of staff also may impact productivity. As the OIG points out: "[A]n office may have an ideal staff ratio, but if it does not have enough writers to prepare decisions or if the writers do not prepare quality decisions, the hearing office's productivity may be impacted negatively."⁴

Under the proposed changes in the NPRM, SSA could take over the scheduling of hearings for an ALJ lacking sufficient support staff or who is working with poor decision writers. The ALJ should not be faulted for maintaining her/his level of expectation for quality decisions.

B. The Impact of Staffing Shortages on Preparing Cases for Hearing

The NPRM introduction states that "some ALJs, but certainly not all," do not provide scheduling staff with enough available hours to schedule a sufficient number of hearings. 73 Fed. Reg. 66565. However, this statement fails to take into account that ALJ productivity is impacted by a lack of cases ready to be scheduled.

Another reason for lower disposition rates found by the OIG was that fewer hearings are scheduled than requested by the ALJ. ALJs told the OIG that "the main reason not enough hearings were scheduled was because of insufficient support staff to prepare cases. Our [the OIG's] analysis of staff ratios confirmed the lack of support staff may have impacted the ability of these ... hearing offices to schedule as many hearings as the ALJs requested."⁵ Hearing office staff interviewed by the OIG corroborated the ALJs' concerns.

² OIG Report, p. 5

³ *Id.*

⁴ OIG Report, p. 6.

⁵ OIG Report, p. 7.

Claimants' representatives across the country have had similar experiences regarding the preparation of cases for hearing. Some hearing offices do not schedule hearings until a case is "pulled," i.e., evidence is identified and placed on the Exhibit List for the record.

In addition, there was a consensus among the witnesses at the September 16, 2008, Congressional hearing that insufficient numbers of cases were being "pulled" and ready to be scheduled for hearing due to insufficient support staff.

C. The Impact of Staffing Shortages on Screening Cases for "On the Record" Decisions

According to the OIG, ALJs with higher productivity tend to issue more "on the record" (OTR) decisions, which take considerably less time for disposition. The key factor, according to the OIG, seems to be that the ALJs with higher disposition rates are "more proactive in screening cases for OTR decisions than were lower producing ALJs."⁶ We agree with this assessment. In many cases, a representative will write a letter to the ALJ, often more than one time, requesting that a decision in the case be expedited due to the claimant's "dire need" and that an OTR decision be issued.

Representatives report that some ALJs will not issue OTR decisions and insist on having an in-person hearing. We believe that this is a small minority of ALJs and, at any rate, they have the discretion to do so. However, the bigger problem is that the ALJs in some hearing offices simply are not made aware that a request for an OTR decision was submitted by the claimant's representative and there is no response to the request. At the hearing, ALJs often learn for the first time that the request was submitted. While this may be due to lack of staff, there also is no uniform procedure to bring these requests to the attention of the ALJs. We have recommended to SSA that it establish some type of notice or acknowledgment that the request was received and is under review by the ALJ.

D. The Impact of Inadequate DDS Development on Productivity

The OIG found that "ALJs and Hearing Office staff at all levels stated that Disability Determination Services (DDS) allowance rates and the quality of case development from DDSs can impact ALJ and hearing office productivity and processing times."⁷ Productivity is affected if ALJs need to spend more time reviewing cases prior to the hearing due to the limited development of evidence by the DDS.

We agree that the lack of development by the DDSs is a significant factor contributing to the backlog at the hearing level. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process. Claimants' representatives are often able to ensure that the claim is properly developed.

There are a number of reasons why the DDSs do not develop cases adequately, including: (1) They do not request specific information tailored to the SSA disability criteria; (2) They do not explain to claimants or providers what evidence is important, necessary, and relevant for adjudication of the claim; (3) Medical providers delay or refuse to submit evidence and cases must then be decided by

⁶ OIG Report, p. 8-9.

⁷ OIG Report, p. 5.

the DDS, based on an incomplete file, in order to meet targeted DDS processing timelines; and (4) Reimbursement rates for providers are inadequate.

E. Length of Hearings

ALJs with a higher use of medical and vocational experts tend to have lower productivity because their hearings are longer. However, as noted by the OIG: "There are certain aspects of the hearing process that an ALJ ... may not have as much control over but can impact ALJ ... productivity and processing times. These factors include the use of experts in hearings"⁸

III. The Practical Impact of the Proposed Change

From a practical perspective and the impact on beneficiaries, we have significant concerns how the proposed change would affect the hearing process.

A. Will hearing offices continue to contact representatives before scheduling hearings?

Representatives are concerned that the proposed change will eliminate the ability of hearing offices to contact them before scheduling a hearing. Currently, many, but not all, hearing offices will take the claimant representative's schedule into account when scheduling hearings. In fact, SSA policy is that hearing office staff "should telephone hearing participants to ascertain availability before scheduling the hearing."⁹ Consistent with this policy, we believe this practice should continue and be used by all hearing offices.

The NPRM introduction notes that the proposed change "would assist in the development of the electronic scheduling initiative." 73 Fed. Reg. 66565. According to SSA, this initiative will electronically integrate the schedules of all hearing participants, including claimants' representatives. We do not know how this electronic scheduling initiative would operate. However, we do not believe that there is an alternative to the current system, as described in the HALLEX, of advance contact with the claimant's representative (now conducted by telephone) to determine availability **before** a hearing date is scheduled.

Given the current long delays, representatives do not want to be put in a position where they have to request a postponement due to a scheduling conflict. The OIG found that ALJs with lower productivity had more hearings postponed, which leads to longer processing times. This can be avoided by contacting the representative in advance, as some hearing offices already do.

In the long run, advance contact with the claimant's representative is the most efficient way to avoid scheduling conflicts and postponements. The availability of claimants, their representatives, and other witnesses can change until a date is confirmed for the hearing. For a claimant's representative, if electronic scheduling involves the submission of available times, there is no guarantee that the individual will continue to be available unless there is some type of advance contact before setting the date.

⁸ OIG Report, p. 14.

⁹ HALLEX I-2-3-10A.3.

B. What will happen if an ALJ does not complete all hearings scheduled by SSA for a specific date?

Under the APA, the ALJ has the authority for the conduct of the hearing. If an ALJ decides certain witnesses are necessary, he/she has the discretion to obtain their testimony. Under the proposed change, an ALJ subject to having hearings scheduled by someone other than the ALJ would lose control over the number of hearings scheduled each day. The NPRM would allow the scheduler to schedule a number of hearings deemed "sufficient" for each day. However, under the APA, the agency cannot force the ALJ to conduct hearings in a certain manner, which is otherwise consistent with the law. As a result, it is a real probability that an ALJ will not complete all of the hearings scheduled for a particular day.

What happens to the claimants required to wait, only to find that their hearing will not go forward? When will the hearing be rescheduled, since presumably the next day will be over-scheduled as well? This "snowball" effect of unheld hearings could have terrible consequences for all involved, including the hearing office, but especially for the claimants who have been waiting for their hearings.

* * * *

In conclusion, we reiterate our strong support for any initiatives that reduce the disability claims backlog and the delays faced by claimants, so long as they do not affect the right to a full and fair hearing before an ALJ. We recommend that SSA withdraw this proposed rule and find alternative ways to increase productivity of the small number of ALJs whose productivity is low.

Delays in decision-making can have devastating effects on individuals already struggling with difficult situations. We believe that staffing is the key factor affecting hearing office performance and we will continue to work with others to ensure that SSA is given adequate funding to make disability decisions in a timely manner.

Sincerely,

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Executive Director

Ethel Zelenske

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